(1) No. 96-730 NOV 6 1996

In the

Supreme Court of the United States

October Term, 1996

Dorothy L. Aldrich, *et al.*,

Petitioners,

v.

General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, Raytheon Constructors Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. Whether the retroactive application of a statute of limitations that results in a retroactive time bar of timely filed cases is consistent with due process and the purposes of Congress in enacting and amending the Price-Anderson Act.

PARTIES TO THE PROCEEDING

The interested parties, petitioners, who appeared before the United States Court of Appeals for the Third Circuit in this proceeding are as follows: Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasléy, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert J. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart and Charlotte Evelyn Stewart.

The respondents are General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, Raytheon Constructors Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of a divided panel of the United States Court of Appeals for the Third Circuit, which affirmed an order of the United States District Court for the Middle District of Pennsylvania that dismissed these timely filed actions as being untimely by retroactive application of the Price-Anderson Amendments Act of 1988, Pub.L.No. 100-408, 102 Stat. 1066 [the "Amendments Act"].

OPINIONS BELOW

The relevant, unreported memorandum opinions and order of the United States District Court for the Middle District of Pennsylvania, dated June 15, 1993, August 16, 1993, June 1, 1994, July 14, 1994, and the judgment dated July 22, 1994, are reproduced at A-1–A-63. The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit, reproduced at A-64–A-93, are reported at 89 F.3d 1106 (3d Cir. 1996). The Court of Appeals' Order re: Sur Petition for Rehearing denying rehearing on August 6, 1996 is reproduced at A-92.

JURISDICTION

After denial of Petitioners' request for Rehearing on August 6, 1996, the judgment of the Court of Appeals was entered on August 19, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The text of §20(b) of the Price-Anderson Amendments Act of 1988, the effective date provision (codified as a note to 42 U.S.C. §2014) is set forth in the Appendix at A-96.

STATEMENT OF THE CASE

This Petition seeks review of the claims of 42 plaintiffs who instituted three separate actions each, in three separate forums, to recover damages for their personal injuries resulting from the Three Mile Island nuclear incident of March 28, 1979. The plaintiffs instituted cases in the Pennsylvania Court of Common Pleas for Dauphin County and in the United States District Court for the Southern District of Mississippi during 1985 and early 1986, well before the Amendments Act. In addition, they instituted cases in Mississippi state court in 1988, also before the Amendments Act. These Mississippi actions were protective actions that were timely filed under the Mississippi 6-year statute of limitations. Plaintiffs specifically

relied upon the principles embodied in *Ferens, infra* to take advantage of the greater time period afforded by Mississippi law. Plaintiffs' cases arrived in the Middle District of Pennsylvania by either removal and transfer or simply transfer to that court under the authority of the Amendments Act, 42 U.S.C.A. §2210(n)(2).

Prior to their removal, plaintiffs were contesting the summary judgment based upon Pennsylvania law favoring the defendants and the affirmance by the Pennsylvania Superior Court. While wending their way through the Pennsylvania judiciary, the United States Congress amended the Price-Anderson Act to provide a mechanism to consolidate all actions involving public liability in one district court, which also permitted the Defendants the ability to remove Plaintiffs' Pennsylvania state court cases. *See* Section 11 of the Amendments Act, 42 U.S.C. §§2014(hh), 2210(n)(2). *See also In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied sub nom., Gumby v. General Public Utilities Corp.*, 112 S.Ct. 1262 (1992). Defendants thereupon removed the cases to the district court prior to expiration of the time Plaintiffs had to file an appeal at the Pennsylvania Supreme Court. Plaintiffs then lost their challenge regarding the constitutionality of the Amendments Act removal provisions and conferral of original jurisdiction over pre-existing state law claims in *TMI II, supra.*

Once firmly lodged in the district court, the defendants filed their motion for summary judgment with regard to the applicability of the Mississippi statute of limitations issue to the cases Plaintiffs instituted in the Mississippi federal and state courts. Defendants asserted that Plaintiffs' claims were time-barred even though they were timely filed in Mississippi by arguing that Mississippi's six-year statute of limitations could no longer be applied to these actions consistent with the choice of law provision in the Amendments Act, 42 U.S.C. §2014(hh), which requires the application of the "law of the State in which the nuclear incident involved occurs." Plaintiffs opposed the motion contending that retroactive application of Pennsylvania's shorter statute of limitations to Plaintiffs' Mississippi filed cases pursuant to the Amendments Act would be unconstitutional.

On June 15, 1993, the district court denied Defendants' motion for summary judgment. Because the court agreed that "Congress clearly did not intend retroactive application of the choice of law provision to oust Plaintiffs of their cause of action," it found that the purpose of the Amendments Act to consolidate all related actions into one forum could not also be interpreted to retroactively deprive the plaintiffs of their pending claims. June 15, 1993 Opinion. [A-11–A-13]. The district court also held that it would be inequitable to deprive plaintiffs of their settled expectations on the availability of a six year statute of limitations. *Id.*

Defendants moved for reconsideration of that ruling or in the alternative to certify the issue for interlocutory appeal. Defendants asserted that the effective date provision, §20 of the Amendments Act, which states that, "the amendments made by Section 11 shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act," compelled a retroactive application that would time bar plaintiffs.

The district court agreed. On August 16, 1993, it granted the Defendants' motion for reconsideration and vacated its June 15, 1993 Order. August 16, 1993 Opinion [A-25]. It then completed its analysis of whether the retroactive application of the Amendments Act's choice of law provision provided due process by finding that the Amendments Act was constitutional. August 16, 1993 Opinion at 7-15 [A-29–A-35]. The district court also rejected Plaintiffs' contention that Pennsylvania law, as incorporated into federal law by the Amendments Act, would provide a grace period to file their existing claims. *Id.* at 15-20 [A-35–A-38].

After further motion practice to limit the extent of the summary judgment, the court entered judgment against the Plaintiffs. *See* June 1, 1994 and July 14, 1996 Orders [A-45–A-61]. Judgment on the claims was entered on July 22, 1994. [A-62].

A divided panel of the Third Circuit affirmed the district court based upon the retroactive application of the Amendments Act's choice of law provision to the statute of limitations question and the

refusal to apply a grace period. [A-64]. In so ruling, however, the majority too broadly interpreted the scope of retroactivity for the choice of law provision of the Amendments Act, and failed to recognize the due process requirement of a grace period. The dissenting panelist, adhering to this Court's precedents, made clear that the majority's interpretation required a rewriting of historical events, and an inappropriate retroactive application the Amendments Act. [A-92].

Petitioners now seek review of these rulings by writ of certiorari.

REASONS FOR ALLOWING THE WRIT

This Petition raises significant issues regarding the restrictions on Congress' ability to reverse and alter the expectations of parties by means of retroactive legislation. This Court has long evinced a reluctance to apply legislation retroactively and has reviewed instances where retrospective application of new law has disrupted substantive rights. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994). Even recently, this Court has accepted certiorari in *United States ex rel. Schumer v. Hughes Aircraft Company*, 63 F.3d 1512 (9th Cir. 1995), *cert. granted*, No. 95-1340, 1996 WL 79951 (U.S. Oct. 15, 1996), to determine the propriety of retroactive application of recent jurisdictional provisions of the False Claims Act. This case deserves similar review to prevent the wholesale destruction of plaintiffs' rights which undeniably existed and had been exercised prior to the retroactive legislation at issue.

Review should be granted to dispel any notion that special interest lobbying may eradicate established rights that persons have already exercised. There is no dispute that plaintiffs' claims were properly and timely filed in the Mississippi courts at the time of their filing. When the nuclear industry could not avoid the consequences of the Mississippi statute of limitations and the decisions in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98-99 (1978) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-54, 256 (1984), and the Third Circuit's rulings in *Stibitz v. General Public Utilities Corp.*, 746 F.2d 993, 997 (3d Cir. 1984), *cert.*

denied, 469 U.S. 1214 (1985) and *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986) (Price-Anderson Act created no federal tort causes of action and there was no basis for federal jurisdiction), the industry lobbied Congress. That lobbying effort resulted in the Amendments Act, which was targeted for these cases. However, the spin suggested by such lobbying and adopted by Congress was to consolidate these cases for uniform treatment in continued litigation. These defendants have taken Congress' loose and nebulous endorsement of the consolidation provisions to eliminate claims which this Court's precedents otherwise suggest should proceed. Unless review is granted, whole classes of litigants may in the future have their judicially recognized rights legislated away by the monied interests soliciting Congress. Certiorari represents the last chance to stop any litigant with a powerful lobby from avoiding the precedents of the courts, to vitiate existing and proper causes of action not only after they accrue but after the litigation proceeds to a point where it cannot be altered on appeal. The results turn our system of jurisprudence on its head.

In addition to the broad repercussions that a review of retroactive legislation will provide in general, review of the issues presented are of significant importance to other TMI public liability litigation as numerous additional plaintiffs also rely upon their timely filed claims in Mississippi in addition to the tolling doctrines of the discovery rule and fraudulent concealment to avoid a possible statute of limitations bar to their claims. Although the record has not yet been developed with respect to these additional plaintiffs' statute of limitations issues, review by this Court would impact the rights of hundreds of additional plaintiffs.

A. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE JUDGMENT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The question at the heart of this petition is whether Congress expressed any intent by the choice of law provisions of the Amendments Act that the retroactive application of Pennsylvania's statute

of limitations to all actions arising from the Three Mile Island ("TMI") accident, should be so broadly interpreted so as to result in a shortening of the statute of limitations that existed at the time plaintiffs timely filed their cases in Mississippi prior to the passage of the Amendments Act to time-bar plaintiffs' claims.

As Judge Sarokin in his dissent noted, the majority's analysis is inconsistent with Congress' intent to promote "'equitable and uniform treatment of victims'", *In re: TMI*, 89 F.3d at 1118, *citing TMI II*, 940 F.2d at 861 (*quoting* H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18, 29 (1987)[A-82], and that the majority has failed to give deference to the principle that federal statutes should be interpreted in a manner that does not "'engender[] constitutional issues if a reasonable alternative interpretation poses no constitutional question,' *Gomez v. United States*, 490 U.S. 858, 864 (1989), by eliminating the constitutional questions of due process". *In re: TMI*, 89 F.3d at 1120. [A-85–A-86].

The broad interpretation of "retroactive application" made by the majority contradicts a primary purpose of the Price-Anderson Act: to provide a mechanism for compensating victims of a nuclear incident. That purpose was not disturbed by the newly created "public liability action" of the Amendments Act, *see* 42 U.S.C. § 2014(hh) (defining "public liability action") and 42 U.S.C. § 2210(n)(2) (creating federal jurisdiction and the ability to remove and consolidate public liability actions), the primary purpose of which was to consolidate litigation arising from nuclear incidents, such as TMI, in a single federal forum (*e.g.*, the Middle District of Pennsylvania) in order to facilitate the resolution of such litigation under uniform legal principles, so such uniform treatment could be provided to plaintiffs and defendants. *See In re: TMI*, 89 F.3d at 1114, *quoting*, S. Rep. No. 218, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S. Cong. & Admin. News 1476, 1488 [A-74] and *citing*, *TMI II*, 940 F.2d at 853 n.18. Thus, neither the jurisdictional nor substantive sections of the Amendments Act evidence a change in Congress' intent that victims of nuclear incidents should be compensated. Further, neither of these sections define the rule(s) of law to be applied with respect to

statute of limitations, which, therefore, necessarily requires the interpretation of Congressional intent.

The interpretation of Congress' intent in passing the Amendments Act must be guided by the fact that Congress saw consolidation as a vehicle for achieving the goals of uniformity, equity and efficiency in the disposition of public liability claims, *TMI II*, 940 F.2d at 858, and the need to provide a mechanism for prompt and efficient compensation of victims, *Id.* at 853, all without the inefficiencies and inconsistent results that may have occurred in the absence of the Amendment Act's consolidation, jurisdiction, venue and choice of law provisions.

The majority's interpretation of the Amendments Act's choice of law provision to include the retroactive application of a shorter statute of limitations is not necessary to achieve the delicate balancing of rights and interests of plaintiffs, defendants and the judicial process that Congress struck in the Amendments Act. Therefore, the majority's interpretation sweeps too broadly and violates the due process rights of the 42 plaintiffs-appellants.

As noted by the dissent:

> Congress contemplated providing a mechanism for consolidating TMI cases *to facilitate their continued litigation. This forward-looking approach evidenced by the legislative history is wholly inconsistent with a congressional desire to extinguish those suits on technical grounds.*

In re: TMI, 89 F.3d at 1123 (emphasis added). [A-90].

* * *

Plaintiffs' rights to due process were trod upon by the majority's mistaken conclusion that Congress intended, through the Amendments Act, to retroactively shorten the statute of limitations and totally abolish claims that were timely filed under governing statute of limitations law that existed prior to the passage of the Amendments Act. There is no rational basis for this conclusion which

purports to rely upon *TMI II*. Indeed, this interpretation of Congressional intent is not supported by *TMI II*.

The holding in *TMI II* that the Amendments Act is constitutional did not *abolish* plaintiffs' claims in their entirety, as the holding of the majority does here, but essentially only enabled a change in the forum where the claims were to be litigated and provided federal law to support what would otherwise be an unconstitutional naked grant of federal question jurisdiction. *See In re: TMI*, 89 F.3d at 1114. [A-75]. *TMI II* found that the rational basis for Congress' determination to provide for the litigation of all public liability claims resulting from a single nuclear incident in a single forum was that consolidation could avoid inconsistent results and inefficiency. This "rational" exercise of Congressional power does not, however, support the majority's interpretation that Congress also intended that timely filed cases be retroactively time-barred once they are transferred to the new forum.

Put another way, there is no "rational" relationship between the retroactive application of the Amendments Act to achieve uniformity and efficiency in the resolution of radiation accident cases and the dismissal of timely filed claims that could easily conform with the Act through removal and conversion into federal claims.

This was essentially the position correctly taken by the dissent. It pointed out that there is nothing in the legislative history of the Act to indicate that "Congress even considered the status of statutes of limitation under that Act, much less intended to include them as substantive rules of decision." *In re: TMI*, 89 F.3d at 1122. [A-88–A-89]. "In the statute of limitations context . . . the difference in theory between the . . . interpretations [of retroactivity posited by the majority and the dissent] translates into a crucial difference in outcome." *Id.* at 1120. [A-85]. The majority's interpretation leaves plaintiffs who timely filed claims before the enactment of the Amendments Act with no cause of action, while the dissent permits these plaintiffs' claims to be litigated on their merits, in a new forum, which is what Congress intended to occur by its passage of the Amendments Act.

The majority found reason and rationality in the juxtaposition between a retroactive time-bar of these claims and a mechanism for their *continued* litigation in another forum. However, the majority's reliance on *TMI II* and other cases it cites for the proposition that Congress can retroactively affect how and where pending litigation *will* proceed prior to a final judgment begs the question. *In re: TMI*, 89 F.3d at 1113. [A-72].

In neither *TMI II* nor the cited cases did the courts interpret Congressional intent in a manner that resulted in the arbitrary and irrational consequence of a complete retroactive dismissal that plaintiffs now suffer. Rather, in the cases cited by the majority, a federal statute retroactively abolished a claim against a private party, but still provided that the claim could be maintained against the United States government. *See Arbour v. Jenkins*, 903 F.2d 416, 419-422 (6th Cir. 1990) (the "Federal Employees Liability Reform & Tort Compensation Act of 1988 ("Westfall Act") . . . amended the Federal Tort Claims Act to provide for the substitution of the United States as a defendant in an action where a federal employee is sued for monetary damages arising from a common law tort allegedly committed by the federal employee acting within the scope of his or her employment." Accordingly, the wife of a deceased postal worker could not sue the postal employees for harassment); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805-806 (11th Cir. 1989) (Under the Westfall Act, plaintiff, an employee of the Public Works Department at the Naval Air Station in Pensacola, Florida, could not sue a Navy employee for injuries he sustained when a tank containing sulfuric acid exploded and caused him injuries); *In re Consol. U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 990-92 (9th Cir. 1987) (Under the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, 42 U.S.C. § 2212, plaintiff could not sue private contractors involved in nuclear testing operations for injuries he sustained due to exposure to radiation caused by nuclear fallout. Rather, he was required to sue the United States government for all such injuries), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *Hammond*

v. United States, 786 F.2d 8, 10-14 (1st Cir. 1986) (same as *In re Atmospheric Testing*).

Thus, in the cited cases, the plaintiffs were not left without a remedy; they could still pursue claims against the federal government. And while these cases are certainly consistent with the holding of *TMI II*—that the retroactive alteration of a cause of action and consolidation of claims is constitutional—they do not support the ruling of the majority here: that the statute of limitations can be applied retroactively to time-bar claims, even where there is no congressional directive to that effect, and even where applying the statute of limitations in that fashion is not relevant to the purpose of the legislation in question. By reviewing this important and unanswered question of federal law, this Court would provide certitude to a recurring issue in our jurisprudence where none presently exists.

B. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The majority's broad interpretation of the Amendments Act so as to extinguish timely filed cases not only does not serve any rational Congressional purpose, but results in an interpretation of the Act in a manner that abridges the plaintiffs' constitutional right of a grace period. The majority's analysis, while questioning the vitality of a grace period under Pennsylvania law, *In re: TMI*, 89 F.3d at 1115, totally ignores the requirement of a grace period under the United States Constitution as interpreted by this Court.

This Court has recognized that due process requires the allowance of a reasonable time after the passage of a new, shorter statute of limitations for a suit to be commenced upon an existing cause of action before it can be considered time-barred. *Block v. North Dakota, ex rel. Board of University and Sch. Lands*, 461 U.S. 273, 286 (1983) ("The Constitution, however, requires that statutes of limitations must allow a reasonable time after they take effect for

commencement of suits upon existing causes of action."); *Texaco Inc. v. Short*, 454 U.S. 516, 527 (1982) ("'It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . . .'"). The majority's conclusion does not provide for this right and contradicts this Court's established precedent.

In this case, the majority has recognized that plaintiffs' Mississippi state and federal court actions were timely filed pursuant to governing law that existed prior to the passage of the Amendments Act. The majority however appears to have concluded that plaintiffs acted improperly by filing claims in the state and federal courts of Mississippi, simply to avoid a possible statute of limitations bar. The majority stated:

> We believe Pennsylvania courts would not look favorably on plaintiffs here who missed Pennsylvania's statute of limitations, although Pennsylvania is the state where the accident occurred, and brought suit in Mississippi.

In re: TMI, 89 F.3d at 1116. [A-77]. Exactly how Pennsylvania courts might view plaintiffs' action is irrelevant. *Id.* at 1122 n.4 (Sarokin, J., dissenting) ("[P]ennsylvania law regarding the statute of limitations has no bearing on the question before us . . . This is purely a question of federal law . . ."). Plaintiffs' claims were timely originated in Mississippi, a proper forum at their time of filing, and the view of Pennsylvania courts on plaintiffs' actions adds nothing to the analysis. The issue is what Congress intended, and whether the newly created federal law can be interpreted consistently with constitutional safeguards.

Similarly, the majority concluded that it is not inequitable to dismiss claims on timeliness grounds, even though they were timely filed in compliance with Mississippi's six year statute of limitations, where the plaintiffs took advantage of filing in a distant forum to gain a longer statute of limitations. *In re: TMI*, 89 F.3d at 1116. However, the inequity of the result here, *i.e.*, absolute dismissal, far

outweighs any inequity caused by federalizing state law claims for radiation-caused injuries as public liability actions, which can be litigated in federal court under federal question jurisdiction. The retroactive change of a state court tort claim to a federal law public liability claim, at least left plaintiffs with claims to pursue, which is far better than being out of court.

Finally, the fact that plaintiffs filed claims in Mississippi should not have been an influence on the majority's analysis. The action that the plaintiffs took to avoid a possible statute of limitations bar was specifically approved in *Ferens v. John Deere Co.*, 494 U.S. 516, 530-31 (1990) (applying Mississippi statute of limitations to action arising in Pennsylvania between plaintiff and defendant who are not citizens of Mississippi), and no adverse inference should have been drawn against plaintiffs for exercising a right that this Court has stated is permissible. The majority opinion totally ignores *Ferens*, arguing that its interpretation of Congress' intent is rational and fair, and does not result in an inequity to plaintiffs. However, contrary to the majority's statements, the result it reaches produces a specific inequity to plaintiffs, *i.e.*, it leaves their timely filed cases now time-barred, by depriving them of their right to rely upon *Ferens*, without any grace period or notice that the timeliness of their claims would now be assessed based upon the retroactive application of a new and shorter statute of limitations.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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